No. 07-0795CV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SIMSBURY-AVON PRESERVATION SOCIETY, LLC
AND GREGORY SILPE,

Plaintiffs-Appellants,

v.

METACON GUN CLUB, INC., ITS MEMBERS AND GUESTS,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut (Hon. Janet Bond Arterton)

AMICI CURIAE **BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE AMERICAN FARM BUREAU FEDERATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES**

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DISCLOSURE STATEMENT PURSUANT TO RULES 26.1 AND 29

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29, The National Association of Home Builders, the American Farm Bureau Federation, and the Chamber of Commerce of the United States of America state that they are not publicly held corporations, do not have any parent corporations, and that no publicly held corporations own ten percent or more of their stock.

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INTEREST OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE AMERICAN FARM BUREAU FEDERATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The National Association of Home Builders, the American Farm Bureau Federation, and the Chamber of Commerce of the United States of America respectfully submit the following brief as *amici curiae*. This brief is submitted pursuant to Rule 29(a), as all parties have consented to its filing.

The National Association of Home Builders ("NAHB") represents over 235,000 builder and associate members throughout the United States, including in states in the Second Circuit. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. NAHB's members are frequently subject to regulation under the Clean Water Act ("CWA"). NAHB, as an organization, has extensive involvement in litigating CWA issues and regularly counsels and educates members on CWA issues. NAHB is a leader in advocacy efforts, before the federal courts, Congress, and the regulatory agencies, on CWA regulatory issues.

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in all 50 states and Puerto

Rico, representing more than 5.6 million member families. Farmers and ranchers routinely use ponds, lagoons, internal channeling ditches, stock ponds, and holding structures as part of productive and necessary farming and ranching activities and thus have a keen interest in the scope of the CWA.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

SUMMARY OF ARGUMENT

The National Association of Home Builders, The American Farm Bureau Federation, and the Chamber of Commerce of the United States, submit this *Amici Curiae* brief in support of the District Court's determination that the waters at issue below were not "waters of the United States," and therefore not regulated under the Clean Water Act ("CWA"). Central to this case is the proper interpretation of the United States Supreme Court's decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Although *Rapanos* involved a four-Justice plurality and a separate concurrence in the judgment, under basic common law principles as applied by the Supreme Court to plurality decisions, *Rapanos*' holding is the common line of reasoning between the plurality and the concurrence that was necessary to the outcome. This reasoning is found only in the common views of the plurality and the concurrence, as the views of the dissenting Justices cannot represent *Rapanos*' holding.

As detailed herein, the plurality and the concurrence agreed on several critical points that were necessary to the judgment in *Rapanos* and thus represent its holding. Specifically, the plurality and the concurrence agreed that remote, speculative, or insubstantial connections between a wetland and a traditional navigable water are insufficient to establish federal jurisdiction. They also rejected the notion, endorsed by the dissenters in *Rapanos*, that a non-navigable wetland

categorically may be regulated under the CWA simply because it has some hydrological connection to a traditional navigable water.

In light of its factual finding that the wetlands at issue in this case had only a "speculative or insubstantial" connection to the Farmington River, the District Court properly concluded, based on the common reasoning of the plurality and concurrence, that CWA jurisdiction was lacking. *See Simsbury-Avon Preservation Soc'y v. Metacon Gun Club*, 472 F. Supp. 2d 219, 230 (D. Conn. 2007). Additionally, this Court should reject the Government's boundless argument that all wetlands that "neighbor" or are in the vicinity of a navigable waterway are categorically subject to regulation under the CWA. Such an interpretation of the CWA's reach directly conflicts with the views of the plurality and concurrence in *Rapanos*, and is inconsistent with pre-*Rapanos* Supreme Court precedent. For all these reasons, *amici curiae* urge this Court to affirm the District Court's decision.

ARGUMENT

I. The Supreme Court's Holding in *Rapanos* Is the Common Line of Reasoning of Those Justices Who *Concurred in the Judgment*, and the Views of the Dissenting Justices Are Not Part of the Holding.

Whether the District Court properly dismissed Plaintiffs' CWA claims turns on this Court's interpretation of the Supreme Court's decision in *Rapanos*. Some of the other parties and *amici* in this case argue that *Rapanos* has no holding because the decision consisted of a four-Justice plurality written by Justice Scalia,

a separate concurrence in the judgment by Justice Kennedy, and a four-Justice dissent written by Justice Stevens. They even go so far as to argue that this Court should follow the views of the *Rapanos* dissenters in interpreting its meaning. However, identifying *Rapanos*' holding is no different than identifying the holding in any other case. Specifically, the *Rapanos* holding is discerned by identifying the reasoning necessary to determine the outcome of the case. As explained below, that holding is found in the readily identifiable common views of the Scalia plurality and the Kennedy concurrence, *i.e.*, the views of those Justices who concurred in the judgment and, importantly, not those who dissented. *See* 20 AM. JUR. 2d *Courts* § 138 ("A minority opinion has no binding, precedential value").

A. Under Fundamental Common Law Concepts, as Applied Under *Marks*, the *Rapanos* Holding Is the Line of Reasoning Common to the Plurality and Concurrence.

Under basic common law principles, a holding is the "necessary" and "pivotal" logic that results in a decision in the case. *See* BLACK'S LAW DICTIONARY 749 (8th ed. 2004) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"); *id.* at 1102 (defining "obiter dictum" as a comment in a judicial opinion "that is unnecessary to the decision in the case and therefore not precedential"). This Court has consistently applied these principles to identify the holdings of its cases. *See Jimenez v. Walker*, 458 F.3d 130, 142 (2d

Cir. 2006) (defining a holding as "what is necessary to a decision"); *United States v. Garcia*, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, J., concurring) (same).

Marks v. United States, 430 U.S. 188 (1977), is rooted in the same basic principles and advises the lower courts how to apply these principles to a Supreme Court case, such as *Rapanos*, that is decided by a four-vote plurality joined by a one-vote concurrence. *Marks* teaches that "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds." *Marks*, 430 U.S. at 193 (emphasis added and internal quotations omitted). Applying *Marks*, lower courts have searched for the "common denominator," "subset," or some similar formulation for the opinions of those Justices who concurred in the judgment. *See, e.g.*, *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (applying common denominator concept); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (discussing both common denominator and subset concepts); *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002) (referencing common denominator concept); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*) (referring to both common denominator and subset concepts).

However, whether conceptualized in terms of "common denominators," "subsets," or some other terminology, *Marks* is simply a tool for identifying the

line of reasoning that was necessary to decide the case. *See Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *modified on other grounds*, 505 U.S. 833 (1992) (describing *Marks* as requiring that "whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produces results with which a majority of the Justices in the case articulating the standard would agree."). Indeed, the Second Circuit has effectively recognized that the ultimate objective of *Marks* is to find the common reasoning among the Justices who concurred in the judgment, and apply that common reasoning as the holding of the case. *See Alcan*, 315 F.3d at 189 (characterizing *Marks* as "work[ing]" when a "narrow opinion" can be identified); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2d Cir. 1992) (as discussed *infra* at pages 9-10, confirming that the "essence" of *Marks* is to find "common ground" among those Justices who concurred in the judgment); *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981) (construing a holding under *Marks* as "referring to the ground that is most nearly confined to the precise fact situation before the Court").

Significantly, even when this Court finds *Marks* difficult to apply to a fragmented Supreme Court decision, it nevertheless identifies a narrow line of reasoning as the rule of law from the case. *See Alcan*, 315 F.3d at 189; *Martino*, 664 F.2d at 872-73. For example, in *Alcan* this Court examined *Eastern*

Enterprises v. Apfel, 524 U.S. 498 (1998), a case in which a deeply divided Supreme Court struck down retroactive application of the Coal Act. This Court rejected the appellant's argument that *Eastern Enterprises* also precluded retroactive application of liability under the Comprehensive Environmental Response, Compensation and Liability Act, reasoning that under *Marks* "it is difficult to discern a general principle of law that supports appellant's claim." 315 F.3d at 189. Nevertheless, *Alcan* concluded that the "binding aspect of [*Eastern Enterprises*] is its specific result," which it interpreted as holding the Coal Act was unconstitutional as applied to Eastern Enterprises. *Id.* at 189. Thus, this Court is not limited to the "subset" and "common denominator" conceptualizations of *Marks*. Instead, consistent with the basic concept of a holding, it can identify the "binding aspect" of such a decision based on the "common ground" of the Justices who concurred in the result. *Alcan*, 315 F.3d at 189; *Tyler*, 958 F.2d at 1182.

As explained below, the Scalia plurality and Kennedy concurrence share a common line of reasoning that determined *Rapanos'* outcome: They held that to assert jurisdiction over a non-navigable wetland, the government must establish that the wetland has more than a remote, speculative, or insubstantial connection to a traditional navigable water. The Scalia plurality and Kennedy concurrence also rejected the argument advanced by the government and embraced by the dissent, *i.e.*, that a non-navigable wetland may be deemed a water of the United States

simply because it has some sort of hydrological connection to a traditional navigable water. Given this commonality among Justices Scalia and Kennedy, this Court can achieve *Marks*'s ultimate objective by identifying "a position implicitly approved by at least five Justices *who support the judgment.*" *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*) (emphasis added).

B. The Views of Dissenting Justices Are Not Part of the Holding of the Case.

In interpreting *Rapanos*, this Court cannot consider the opinions of the four dissenting Justices. It is black letter law that a dissent is not a portion of a court's holding, and therefore has no *stare decisis* impact. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2006) ("Stare decisis does not apply to dissenting opinions."); 20 AM. JUR. 2D *Courts* § 138 ("A minority opinion has no binding, precedential value").

Consistent with the traditional concept of a holding, *Marks* precludes consideration of the views of the *Rapanos* dissenters in its instruction that the holding of a fragmented decision is the position taken by the Justices "who *concurred in the judgments* on the narrowest grounds." *Marks*, 430 U.S. at 193 (emphasis added); *see also Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2d Cir. 1992); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (*en banc*). This Court's decision in *Tyler* confirms that views of dissenting Justices should not be considered in a *Marks* analysis. In determining whether the Supreme Court's

decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), required a plaintiff to produce "direct evidence" of age discrimination, this Court noted that other courts had interpreted *Price Waterhouse* as requiring such evidence based on Justice O'Connor's concurring opinion and the views of dissenting Justices. *Tyler*, 958 F.2d at 1182-83. This Court rejected such a "head counting" approach that would have included the views of dissenting Justices, specifically noting that the plurality and another concurring Justice did not impose a "direct evidence" requirement. *Id.* at 1183. The D.C. Circuit, in *King v. Palmer*, similarly refused to consider dissents under a *Marks* analysis, and explicitly concluded it could not "combine a dissent with a concurrence to form a *Marks* majority." 950 F.2d 771, 783 (D.C. Cir. 1991) *(en banc)*.

Given that basic principles of the common law, the clear language of *Marks*, the D.C. Circuit's decision in *Palmer*, and this Court's *Tyler* decision all reject reliance on dissents in applying *Marks*, there is no basis for the Government's assertion that the *Rapanos* decision may be "illuminated" by the views of the Justice Stevens's *Rapanos* dissent. *See* Gov't Br. at 8. The cases relied upon by the Government stand for nothing more than the unremarkable proposition that, on some occasions, the Supreme Court cites dissenting opinions, not that they apply

them as the holding of the case.[1] For example, in *Wilton v. Seven Falls Company*, a case cited by the Government, the Supreme Court merely explained the development of its abstention jurisprudence in part by referencing an earlier decision which in turn discussed dissenting opinions issued in yet an even earlier decision. 515 U.S. 277, 285 (1995). Not only was this historical review irrelevant to the Supreme Court's holding in *Wilton*,[2] at no time did the Supreme Court in

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[1] None of the cases cited by the Government support its claim that views of dissenting Justices should be applied in determining the holding of a splintered Supreme Court decision. *See Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (see discussion *infra* at 12); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (citing dissents in *Will v. Calvert* not as representing *Will*'s holding, but merely to show *Will* had not undermined Court's decision in *Colorado River*); *Wilton v. Seven Falls Co.*, 515 U.S. 227, 285 (1995) (discussed *infra* at 11-12); *League of Latin American Cities v. Perry*, 126 S.Ct. 2594, 2607 (2006) ("LLAC") (citing dissents in *Vieth v. Jubelier* not for purposes of determining *Vieth*'s holding, but merely to show disagreement on justiciability issue -- an issue that the Court never reached in *LLAC*); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) (discussed *supra* at 9-10). The Government also relies on *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *petition for cert. filed,* (June 8, 2007) (No. 07-9). Two members of the First Circuit panel in *Johnson* -- over the contrary dissenting opinion of Judge Torruella -- cited the views of dissenting Justices in *Rapanos* to support their conclusion that CWA jurisdiction could be established under either the plurality or Justice Kennedy's opinion. *Id.* at 64-66. *Johnson*, however, is hardly a ringing endorsement for this Court's consideration of dissenting opinions. The majority in *Johnson* not only ignored basic common law principles that preclude including dissents as part of a case holding, but entirely refused to follow *Marks*' clear instruction that the rule of law should be discerned from a fractured decision based solely on those Justices "who concurred in the judgments." *Marks*, 430 U.S. at 193.

[2] After recalling the historical development of its abstention jurisprudence, the *Wilton* Court explained that those cases -- including the decision cited by the

Wilton discuss *Marks* or otherwise detract from *Marks*'s clear instruction to interpret fragmented decisions based on the opinions of Justices "who concurred in the judgments." 430 U.S. at 193. In fact, the only Supreme Court opinion cited by the United States that considers dissenting opinions in the context of a *Marks* analysis is the lone concurring opinion of Justice Souter in *Waters v. Churchill*, 511 U.S. 685 (1994) (Souter, J., concurring and citing *Marks* without analyzing its requirements or addressing whether dissents can be relied upon consistent with basic common law concept of a holding). Such a concurring opinion, of course, cannot overrule the long-established meaning of a "holding" under the common law or the clear language of *Marks*, both of which preclude consideration of dissenting opinions in interpreting *Rapanos*.

In sum, *Rapanos* does have a holding. That holding, consistent with *Marks* and the basic principles of the common law, is the readily discernable common reasoning of the plurality and concurrence that was necessary to produce the result in *Rapanos*. Specifically, that common reasoning, detailed below, resulted in the District Court's correct conclusion that the wetlands at issue were not included in "the waters of the United States" under the CWA.

United States -- were not relevant to the abstention question at issue because those cases did not involve the Declaratory Judgment Act. 515 U.S. at 286.

II. The *Rapanos* Plurality and Concurrence Both Require More Than a Remote Connection Between Wetlands and Traditional Navigable Waters, and the District Court Properly Concluded that Such a Connection Was Lacking in this Case.

The Scalia plurality and Kennedy concurrence rest on certain fundamental points of agreement that were necessary to the *Rapanos* judgment. Both Justices anchor their respective opinions to the facts at issue in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside Bayview*") (wetlands actually abutting navigable waters), and *Solid Waste Agency of Northern Cook County v. Army Corps of Eng'rs.*, 531 U.S. 159 (2001) ("*SWANCC*") (ponds isolated from navigable waters). Both Justices read these cases as requiring that, to trigger coverage under the definition of "the waters of the United States," a non-navigable wetland cannot simply have a remote, speculative, and attenuated hydrological and physical relationship with traditional navigable waters. In ascertaining the scope of jurisdictional wetlands, Justice Scalia stressed *Riverside Bayview*'s boundary-drawing problem, such that it is difficult to determine where the navigable waters end and the wetlands begin. For his part, Justice Kennedy describes the relationship as a "significant nexus" between a wetland and a navigable water. Each Justice emphasizes that a "speculative or insubstantial" relationship is not sufficient. Moreover, both require more than an *occasional* hydrological connection to navigable waters to establish CWA coverage, which, at most, is all that appellants have shown here.

The District Court applied these common principles to the facts at hand and properly found that the relationship between the wetlands at the Metacon site and navigable waters was merely "speculative or insubstantial." *Simsbury-Avon Preservation Society v. Metacon Gun Club,* 472 F. Supp. 2d 219, 230 (D. Conn. 2007). Accordingly, the District Court's determination that the wetlands are not encompassed within the term "the waters of the United States" should be affirmed.

A. The Plurality and Concurrence Both Read *Riverside Bayview* and *SWANCC* as Requiring More Than a Speculative and Insubstantial Relation to Navigable Waters.

Justices Scalia and Kennedy both ground their opinions in *Rapanos* in the facts and rationale of the Court's prior decisions in *Riverside Bayview* and *SWANCC.* As Justice Kennedy stated, these prior cases "establish the framework of the inquiry" for determining CWA jurisdiction. *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring). Both Justices focus on the facts at issue in these prior cases, and discuss them in nearly identical ways.

They both begin by emphasizing that *Riverside Bayview* concerned "wetlands that 'actually abut[ted] on' traditional navigable waters." *Rapanos*, 126 S. Ct. at 2225 (Scalia, J., plurality opinion); *id.* at 2240 (Kennedy, J., concurring) (*Riverside Bayview* concerned a "wetland that directly abutted a navigable-in-fact creek"). For Justice Scalia, *Riverside Bayview* depended on the "close connection between" and "the gradual blend[ing]" of the traditionally navigable waters and the

wetlands. *Rapanos*, 126 S. Ct. at 2226 (Scalia, J., plurality opinion). Thus, the difficult task to determine where "water ends and land begins" was the *sine qua non* of the Court's jurisdictional finding in *Riverside Bayview*. *Id.* ("[W]etlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States."). Kennedy similarly read *Riverside Bayview* as supporting jurisdiction where "*the connection* between the wetlands and navigable waters may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water.'" *Id.* at 2241 (Kennedy, J., concurring) (emphasis added).

Each Justice then distinguished the "inseparable" relationship between the wetlands and navigable waters in *Riverside* from the isolated ponds at issue in *SWANCC*. In rejecting jurisdiction over *SWANCC*'s isolated waters, both Justices noted that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*." *Id.* at 2226 (Scalia, J., plurality opinion); 2240-41 (Kennedy, J., concurring) ("Absent a significant nexus [as was present in *Riverside Bayview*], jurisdiction under the Act is lacking.")

Scalia found that the isolated ponds at issue in *SWANCC* "presented no boundary-drawing problem" and therefore the touchstone element of jurisdiction -- a significant relationship between the pond and navigable waters -- was lacking.

Id. at 2230-31 (Scalia, J., plurality opinion). Reading *Riverside Bayview* and *SWANCC* together, Scalia concluded in *Rapanos* that wetlands are

> waters of the United States if they bear the "*significant nexus*" of physical connection which makes them as a practical matter indistinguishable from waters of the United States.

Id. at 2234 (Scalia, J., plurality opinion) (emphasis added).

Like Scalia, Kennedy hearkened back to the "significant nexus" test, observing that:

> Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a *significant nexus*. . . wetlands possess the requisite *nexus* . . . if the wetlands, either alone or in combination with similarly situated lands in the region, *significantly* affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."

Id. at 2248 (Kennedy, J., concurring) (emphasis added).

Both included important caveats to exclude wetlands with only remote or insubstantial connections. Justice Scalia:

> [W]etlands with only an intermittent, physically remote hydrological connection to 'waters of the United States' do not implicate the boundary drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a significant nexus in *SWANCC.*

Id. at 2226 (Scalia, J., plurality opinion). Justice Kennedy:

> When in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters."

Id. at 2248 (Kennedy, J., concurring).

In sum, both would find a significant hydrological relationship where wetlands directly abut navigable waters, as was the case in *Riverside Bayview*.[3] But where the relationship is speculative, insubstantial, or remote, neither would support jurisdiction. Importantly for the case at bar, in *Rapanos* the plurality and the concurrence considered and rejected the government's argument that *a* hydrological connection between wetlands and navigable waters is enough to establish CWA jurisdiction. Justices Scalia and Kennedy agree that a simple showing of "a" or an "occasional" connection to navigable waters is not sufficient to establish a significant relationship. *Id.* at 2222, 2226 (Scalia, J., plurality opinion); *id.* at 2247-48 (Kennedy, J., concurring).

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[3] Kennedy raises concerns that a literal reading of Scalia's two-part test requiring a permanent and continuous connection to navigable waters could allow the government to allege jurisdiction over "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)...." *Id.* at 2246. Yet, the words "however remote" and "however small" do not appear in Scalia's test and are inconsistent with the plain language of his opinion which states that "wetlands with physically remote hydrological connection[s]" cannot support federal jurisdiction. *Id.* at 2226 (Scalia, J.). Therefore, such a literal reading of Justice Scalia's test should not be allowed.

B. The Plurality and Concurrence Both Require More Than "A" Hydrological Connection to Traditional Navigable Waters.

The Government argued in *Rapanos* that a wetland with "any hydrological connection to navigable waters no matter how remote or insubstantial" is a water of the United States under the CWA. *See, e.g.,* Brief for the Respondents in Opposition to Petition for Writ of Certiorari, *Carabell v. Army Corps of Eng'rs*, 126 S. Ct. 2208 (2006) (No.04-13840) ("[T]he wetland on petitioners' tract has at least an *occasional hydrologic connection* to the unnamed ditch and thus to Lake St. Clair, a traditional navigable water."). While the dissent in *Rapanos* would have agreed with this theory, Justices Scalia and Kennedy both rejected the Government's arguments as inconsistent with the statute and the Court's prior decisions in *Riverside Bayview* and *SWANCC.*

Justice Kennedy emphasized that a "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Rapanos,* 2208 S. Ct. at 2251 (Kennedy, J., concurring). He was particularly critical of the dissent's endorsement of sweeping jurisdiction based upon any hydrological connection. *Id.* at 2247 ("the dissent would permit federal regulation whenever the wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.").

Justice Scalia likewise recognized that a definition of waters of the United States based solely on a hydrological connection would be boundless. *Id.* at 2222 (Scalia, J., plurality opinion) ("In applying the definition to . . . storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody."). It is therefore clear that both Scalia and Kennedy would require *more than a hydrological connection* to establish that a non-navigable water is a water of the United States.

C. The District Court Properly Applied the Common Elements of the Plurality and Concurrence, and Correctly Determined that the Metacon Wetlands Are Not Waters of the United States.

The Appellants' jurisdictional arguments, and the facts they present in support of those arguments, are simply a rehash of the any hydrological connection theory that was rejected in *Rapanos*. *See* Appellants' Br. at 21 ("a vernal pool and wetlands drain into Horseshoe Cove, which runs into the Farmington River."). At the District Court, the Appellants relied on the testimony of Gregory Silpe who stated, based on his personal knowledge of the site, that "'[b]ehind the Metacon berm is actually standing water' which 'goes into what's called a horseshoe cove,' 'a waterway that's actually directly connected to the water that's behind the Metacon Gun Club' and that 'eventually goes below Route 185 into the Farmington River.'" *Simsbury*, 427 F. Supp 2d at 228 (citing Def. Ex. 24 at 95).

While the Gun Club's evidence showed "no surface water connection by which rainwaters, flood waters, or wetland waters on the Site flow directly from the Site to the Farmington River," *Simsbury*, 472 F. Supp. 2d at 228 (citing Def. Ex. 31 at 10), Silpe submitted pictures allegedly "showing *a surface water connection* between the Metacon Gun Club and Horseshoe Cove, which flows into the Farmington River." *Simsbury*, 472 F. Supp. 2d at 228 (citing Pl. Ex. 16). The District Court examined the evidence, noted that the connection occurred sporadically, if at all, and rightly concluded that after *Rapanos* simply showing *a* surface connection between the Metacon site and navigable waters is not sufficient to establish CWA jurisdiction.[4] *Simsbury*, 472 F. Supp. 2d at 228-29 (citing

[4] There are several additional grounds to support the District Court's judgment that wetlands on this site are not jurisdictional. First, it is not at all clear that the Farmington River actually qualifies as a "traditional navigable water" as established by Supreme Court precedent. *See, e.g.*, *The Daniel Ball*, 77 U.S. 557, 563 (1870) (defining a traditional navitable water as waterways that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"). Second, the Plaintiffs-Appellants' allege that the vernal pool behind the berm flows into wetlands that connect with other waters. Corps regulations do not recognize wetlands "adjacent" to other wetlands as waters of the United States. 33 C.F.R. 328.3(a)(7) ([w]etlands adjacent to waters (*other than waters that are themselves wetlands*) . . ."). Third, to be a jurisdictional wetland under the federal CWA, the wetland itself must first be determined to meet the *three* criteria set forth in the Corps' 1987 Delineation Manual. *See* ENVIRONMENTAL LABORATORY, DEP'T OF THE ARMY, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL 14 (1987) (requiring evaluation of soils, vegetation, and hydrology to determine presence of wetlands). The wetlands at issue here have not been delineated pursuant to those criteria, and therefore may

Rapanos, 126 S. Ct. at 2226). If anything is clear following *Rapanos*, it is that Scalia and Kennedy both require more than a hydrological connection to establish jurisdiction.

Accordingly, the District Court properly concluded that in the "light most favorable to the plaintiffs, at least a periodic physical nexus between the site and the navigable waters of the Farmington River" exists, but such a connection does not pass muster under either the plurality or the concurrence or the common elements of both opinions. *Simsbury*, 472 F. Supp. 2d at 229. Instead, "this is a case in which the wetlands effects on water quality are speculative or insubstantial. . . ." *Simsbury*, 472 F. Supp. 2d at 230, citing *Rapanos*, 126 S. Ct. at 2248. The *Rapanos* plurality and concurrence both hold that speculative and insubstantial relationships are not enough. The District Court's findings of fact -- namely that only a "periodic" and "speculative" relationship exists -- should not be set aside unless clearly erroneous. *See Retirement Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F. 3d 419, 425 (2d Cir. 2004) ("a district court's findings of fact may be overturned only if clearly erroneous").

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lack all certain characteristics necessary to be considered a wetland under the Corps' 1987 Delineation Manual.

III. Contrary to the Government's Argument, Wetlands Cannot Be Deemed Waters of the United States Simply Because They "Neighbor" or are in the Vicinity of Traditional Navigable Waters.

Lacking a basis to overturn the District Court's finding that no significant nexus exists between the wetlands at issue in this case and the Farmington River, the Government seeks instead to derive from *Rapanos* a *per se* rule that any wetland "neighboring" a traditional navigable water, however bereft of any connection to such water, is categorically jurisdictional. The Government argues that the District Court "failed to properly consider all elements of Justice Kennedy's standard and also implied that the standard is much narrower than the actual inquiry articulated." Gov't. Brief at 13.

In so arguing, the Government is attempting to convert Justice Kennedy's summary of the holding of *Riverside Bayview* (*i.e.*, that wetlands adjacent to traditional navigable waters are within "the waters of the United States") into an endorsement of its new argument that wetlands that "neighbor" a traditional navigable water are categorically jurisdictional. The Supreme Court has never had a case with a fact pattern that required examination of the Government's "neighboring" wetlands theory, nor has it ever addressed this neighboring theory in the abstract. Further, a theory of jurisdiction based on a wetland's location in the "neighborhood" of a traditional navigable water is starkly at odds with the plurality

and concurring opinions in *Rapanos*, both of which require a significant physical or hydrological relationship between wetlands and traditional navigable waters.

A. Wetlands that Simply "Neighbor" Navigable Waters Do Not Meet Justice Kennedy's Standard.

The Government argues that after *Rapanos* all "wetlands adjacent to navigable-in-fact waters are categorically jurisdictional waters under the CWA." Gov't Br. at 14. This is wrong. Justice Kennedy makes clear that his view of the significant nexus standard applies to *all* wetlands whether near navigable waters or not. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring) ("Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' *jurisdiction over wetlands depends upon* the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." (emphasis added)).

Far from articulating a significant nexus in the case at hand, the Government simply asserts that the "Farmington River at least 'neighbors' the claimed wetlands on the Metacon property," and therefore, because the Corps' regulations define "adjacent" to include "neighboring," the Metacon wetland automatically meets Kennedy's supposed standard for jurisdiction. This is putting words in Justice Kennedy's mouth. None of the Court's prior wetlands cases involved or addressed "neighboring" wetlands, and the Court has never considered whether the Corps' inclusion of "neighboring" wetlands in its definition of "adjacent" would pass

muster under the CWA. Moreover, Justice Kennedy's statement about wetlands adjacent to traditional navigable waters was made against the background of *Riverside Bayview*, a case involving wetlands that Justice Kennedy understood to have "actually abutted" traditional navigable waters. Finding that "neighboring" wetlands are categorically jurisdictional would be inconsistent with Justice Kennedy's firm position that wetlands not specifically covered by *Riverside Bayview* must be tested against the "significant nexus" standard. Under the Government's proposed reading of the concurrence, a neighboring wetland with a remote, speculative, and insubstantial relationship to navigable waters would nevertheless be jurisdictional. This boundless and unconstrained view of the CWA in not supported by Justice Kennedy's concurrence or any prior Supreme Court case. Indeed, in many cases wetlands under this broad standard "might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 126 S. Ct at 2249 (Kennedy, J., concurring).

B. The Government's Argument is Inconsistent with *Riverside Bayview* and *SWANCC*.

The Government's neighboring wetlands theory is clearly inconsistent with the holdings in *Riverside Bayview* and *SWANCC* on which Justice Kennedy rests his "significant nexus" standard. *Riverside Bayview* upheld CWA jurisdiction over "wetlands that actually abutted a navigable-in-fact waterway." *Rapanos*, 126 S.

Ct. at 2225 (Scalia, J., plurality opinion); *id.* at 2240 (Kennedy, J., concurring). Indeed, the wetlands at issue in *Riverside Bayview* were so significantly intertwined with the navigable-in-fact waters that the Government at oral argument before the Supreme Court argued that "there is direct, unimpeded access from the mid-east boundary of the Riverside property. . . . Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property into the Great Lakes." Transcript of Oral Argument at 5-6, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Moreover, in describing the term "adjacent" to the Court, nowhere in *Riverside Bayview* is the term "neighboring" mentioned. Indeed, at oral argument in *Riverside*, the government's attorney explained that "by adjacent, I mean it is immediately next to, abuts, adjoins, borders . . . navigable waters." *Id.*

Moreover, the Court itself did not cite the Government's regulation for its notion of what adjacent means, but instead described the *Riverside* wetland as "adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 121. Accordingly, it is clear that when the Court in *Riverside* was discussing the "adjacent" wetlands at issue, it meant the factual circumstances before it, not the Government's vague and unconstrained notion of neighboring

wetlands it advances here. Therefore, Kennedy's statement about wetlands adjacent to navigable waters in *Rapanos* must be read in light of the facts at issue in *Riverside* on which he based his statement. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J, concurring.) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference. . . That is the holding of *Riverside Bayview*."). Nowhere in *Riverside Bayview* did the Court hold that "neighboring" wetlands are jurisdictional, as such facts were not presented. Instead, the case concerned wetlands that directly abutted and adjoined navigable waters.

Building on *Riverside Bayview*, the *SWANCC* Court similarly emphasized that there must be an "inseparable" relationship between wetlands and navigable waters. "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC* at 167 (emphasis added). Certainly nothing in *SWANCC* stands for the proposition that wetlands "near" navigable waters are categorically jurisdictional under the CWA. Indeed, the Government itself has noted that nothing in *Rapanos* should be read to overturn *SWANCC*. U.S. ARMY CORPS OF ENGINEERS, JURISDICTIONAL DETERMINATION FORM INDUSTRIAL GUIDEBOOK app. A at 8 (2007) (providing Corps' guidance on applying *Rapanos* and stating "[n]othing in this Guidance

should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*.").

Here, the District Court has found that there is no significant nexus between the neighboring wetland at issue and the Farmington River. Neither pre-*Rapanos* Supreme Court precedent nor a fair reading of the plurality and concurrence in *Rapanos* require that jurisdiction must be categorically imposed on this unconnected wetland.

C. Justice Kennedy's Observation Was Not Part of the *Rapanos* Holding.

Even if the concurrence could be read as stating categorically that wetlands neighboring traditionally navigable waters are waters of the United States, which it cannot, this statement was not "necessary to the decision" in *Rapanos*, as the case did not concern wetlands neighboring navigable-in-fact waters. *See Jimenez v. Walker*, 458 F.3d 130, 142 (2d Cir. 2006) (defining a holding as "what is necessary to a decision"). It is therefore not part of the holding of the case. As the National Wildlife Federation *amici* concede, the holding should be "confined to apply only to the precise facts at issue in the split ruling and does not implicate more general rules." *Nat'l Wildlife Fed'n* Br. at 24. The Court has never decided a case involving the "precise facts" of wetlands that simply "neighbor" navigable waters. Moreover, the plurality outright rejects the notion that "neighboring" wetlands can be jurisdictional. Since the wetlands at issue in *Riverside* actually abutted waters

of the United States, "the case could not possibly have held that merely 'neighboring' wetlands come within the Corps' jurisdiction." 126 S. Ct. at 2226 n 10.

CONCLUSION

For all the reasons set forth above, the court should affirm the judgment of the District Court.

Dated: August 8, 2007

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RULE 32(a)(7) CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the requirements of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that it is set in 14-point proportionally spaced typeface and contains no more than 7,000 words, including headings, footnotes and quotations.

The undersigned has relied upon the word count function of Microsoft Word 2003, the word-processing system used to prepare this brief. According to that word count, this brief contains 5,770 or fewer words.

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ANTI-VIRUS CERTIFICATION

Case Name: Simsbury-Avon Preservation Society, LLC and Gregory Silpe v. Metacon Gun Club, Inc., Its Members And Guests

Docket Number: 07-0795CV

I, Jeffrey C. Corey, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to briefs@ca2.uscourts.gov in the above referenced case, was scanned using McAfee VirusScan Enterprise Version 8.0. and found to be virus free.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief of the National Association of Homebuilders has been served upon the following counsel of record by first class mail, postage prepaid, and a PDF copy has been emailed to counsel as indicated below, on this 8th day of August, 2007.

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